



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2018-0028]

RIN 0750-AJ71

Defense Federal Acquisition Regulation Supplement: Sunset of Provision Relating to the Procurement of Certain Goods (DFARS Case 2018-D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that repeals the Fiscal Year 2015 restrictions on the source of photovoltaic devices in contracts awarded by DoD that result in DoD ownership of photovoltaic devices by means other than DoD purchase of the photovoltaic devices as end products.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 42822 on August 24, 2018, to implement section 813(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 813(b) repeals section 858 of the NDAA for FY 2015 (Pub. L. 113-291), but does not repeal section 846 of the NDAA for FY 2011 (Pub. L. 111-383), with regard to sources of photovoltaic devices purchased by contractors that become property of DoD. There were no public comments submitted in response to the proposed rule. There are no changes from the proposed rule in the final rule.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not affect the applicability of DFARS clause 252.225-7017, Photovoltaic Devices, and DFARS provision 252.225-7018, Photovoltaic Devices—Certification. A determination was signed by the Director, Defense Procurement and Acquisition Policy, on October 13, 2011, to not apply the requirements of section 846 of the NDAA for FY 2011 to contracts at or below the simplified acquisition threshold, but to apply the rule to contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this final rule is not significant under E.O. 12866.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule implements section 813(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91), which repealed of section 858 of the National Defense Authorization Act (NDAA) for FY 2015 (Pub. L. 113-291), while

retaining the requirements of section 846 of the NDAA for FY 2011 (Pub. L. 111-383), with regard to sources of photovoltaic devices purchased by contractors that become the property of DoD.

The objective of this rule is to revert to the regulations on photovoltaic devices that were in effect prior to superimposing the additional regulations required by section 858 on November 20, 2015 (80 FR 72599). By restoring the tie to the Buy American statute, this rule reinstates the Buy American exceptions for acquisitions of photovoltaic devices below the micro-purchase threshold, nonavailability, unreasonable cost, and public interest, including the DoD class determinations that exempt U.S.-made and qualifying country photovoltaic devices from the requirements of the Buy American statute, as well as the Governmentwide determination that removes the component test for commercially available off-the-shelf items.

No significant issues were raised by the public comments in response to the initial regulatory flexibility analysis. No public comments were received.

This rule generally applies at the prime contract level to other than small entities. When purchasing renewable power generated via onsite photovoltaic devices, DoD can either purchase the photovoltaic devices and thereby own, operate, and maintain the devices for their full economic life (already

covered in DFARS part 225 under standard Buy American statute/Trade Agreements regulations) or, for example, may do some variation of the following:

a. Enter into an energy savings performance contract, which is a contracting method in which the contractor provides capital to facilitate energy conservation measures and maintains them in exchange for a portion of the energy savings generated. Under this arrangement, the Government would take title to the devices during contract performance or at the conclusion of the contract. For example, DoD uses either the master indefinite delivery-indefinite quantity contract of the Department of Energy or the Army Corps of Engineers and awards task orders off one of those contracts. Generally, the same approved contractors are on each contract. Of the approved contractors, all but one are large businesses. There are subcontracting goals that each contractor has to meet, but the ultimate task order award is most often made to a large business.

b. Enter into a power purchase agreement, also referred to as a utility service contract, for the purchase of the power output of photovoltaic devices that are installed on DoD land or buildings, but owned, operated, and maintained by the contractor. At the conclusion of the contract, DoD would either require the contractor to dismantle and remove the photovoltaic equipment or abandon the equipment in place. Prime contractors

for this type of contract would generally be large businesses, based on the capital costs involved in these projects. However, many developers tend to subcontract out the majority of the work to smaller companies.

There are approximately 80 manufacturers of photovoltaic devices. We do not currently have data available on whether any of the manufacturers of photovoltaic devices are small entities, because the Federal Procurement Data System does not collect such data on subcontractors.

There are no new reporting burdens under this rule. In fact, there is a *de minimis* reduction in burden, because no certification will be required if the value of the photovoltaic devices does not exceed the micro-purchase threshold, and identification of country of origin will no longer be required if the photovoltaic devices are domestic or U.S.-made. Furthermore, since the prime contractors subject to this rule are other than small businesses, the existing reporting requirements do not impact small entities.

DoD did not identify any significant alternatives that meet the requirements of the statute and would have less impact on small entities. The overall effect of this rule is deregulatory and it does not have significant impact on small entities.

VI. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C chapter 35); however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0229, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) Part 225, Foreign Acquisition, and related clauses at DFARS 252.225."

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by revising paragraphs (f)(ix)(J) and (K) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ix) * * *

(J) Use the clause at 252.225-7017, Photovoltaic Devices, as prescribed in 225.7017-4(a), to comply with section 846 of Public Law 111-383.

(K) Use the provision at 252.225-7018, Photovoltaic Devices-Certificate, as prescribed in 225.7017-4(b), to comply with section 846 of Public Law 111-383.

* * * * *

PART 225-FOREIGN ACQUISITION

3. Amend section 225.7017-1 by revising the definitions of "covered contract" and "domestic photovoltaic device" to read as follows:

225.7017-1 Definitions.

* * * * *

Covered contract means an energy savings performance contract, a utility services contract, or a private housing contract awarded by DoD, to be performed in the United States, if such contract results in DoD ownership of photovoltaic devices, by means other than DoD purchase as end products. DoD is deemed to own a photovoltaic device if the device is—

(1) Installed in the United States on DoD property or in a facility owned by DoD; and

(2) Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

* * * * *

Domestic photovoltaic device means a photovoltaic device that is manufactured in the United States.

* * * * *

4. Revise section 225.7017-2 to read as follows:

225.7017-2 Restriction.

In accordance with section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383), photovoltaic devices provided under any covered contract shall comply with 41 U.S.C. chapter 83, Buy American, subject to the exceptions to that statute provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.).

5. Revise section 225.7017-3 to read as follows:

225.7017-3 Exceptions.

DoD requires the contractor to utilize domestic photovoltaic devices in covered contracts that exceed the simplified acquisition threshold, with the following exceptions:

(a) *Qualifying country.* Qualifying country photovoltaic devices may be utilized in any covered contract, because 225.103(a)(i)(A) provides an exception to the Buy American statute for products of qualifying countries, as defined in 225.003.

(b) *Buy American—unreasonable cost.* For a covered contract that utilizes photovoltaic devices valued at less than \$180,000, the exception for unreasonable cost may apply (see FAR 25.103(c)). If the cost of a foreign photovoltaic device plus 50 percent is less than the cost of a domestic photovoltaic device, then the foreign photovoltaic device may be utilized.

(c) *Trade agreements—(1) Free Trade Agreements.* For a covered contract that utilizes photovoltaic devices valued at \$25,000 or more, photovoltaic devices may be utilized from a country covered under the acquisition by a Free Trade Agreement, depending upon dollar threshold (see FAR subpart 25.4).

(2) *World Trade Organization—Government Procurement Agreement.* For covered contracts that utilize photovoltaic devices that are valued at \$180,000 or more, only U.S.-made photovoltaic devices, designated country photovoltaic devices, or qualifying country photovoltaic devices may be utilized.

225.7017-4. [Removed]

6. Remove section 225.7017-4.

225.7017-5 [Redesignated as 225.7017-4]

7. Redesignate section 225.7017-5 as 225.7017-4 and in the newly redesignated section 225.7017-4, revise paragraph (a)(1) to read as follows:

225.7017-4 Solicitation provision and contract clause.

(a)(1) Use the clause at 252.225-7017, Photovoltaic Devices, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a contract expected to exceed the simplified acquisition threshold that may be a covered contract, i.e., an energy savings performance contract, a utility service contract, or a private housing contract awarded by DoD, if such contract will result in DoD ownership of photovoltaic devices, by means other than DoD purchase as end products.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 252.225-7017 by—

- a. In the introductory text, removing “225.7017-5(a)” and adding “225.7017-4(a)” in its place;
- b. Removing the clause date “(JAN 2018)” and adding “(DEC 2018)” in its place;
- c. In paragraph (a)—
 - i. Removing subparagraph designations “(i)” and “(ii)” and adding “(1)” and “(2)” in their places wherever they appear;
 - ii. Removing subparagraph designations “(iii)” and “(iv)” and adding “(3)” and “(4)” in their places wherever they appear;
 - iii. Revising the definition of “domestic photovoltaic device”;
- d. In paragraph (b), removing “858 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291)” and

adding "846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383)" in its place; and

e. In paragraph (c)—

i. Revising paragraph (c)(1);

ii. In paragraph (c)(2), removing "photovoltaic device as specified, or," and adding "photovoltaic device, or," in its place; and

iii. Revising paragraphs (c)(3), (4), and (5).

The revisions read as follows:

252.225-7017 Photovoltaic Devices.

(a) * * *

Domestic photovoltaic device means a photovoltaic device that is manufactured in the United States.

* * * * *

(c) * * *

(1) More than the micro-purchase threshold but less than \$25,000, then the Contractor shall utilize only domestic photovoltaic devices unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (d)(2) of the Photovoltaic Devices—Certificate provision of the solicitation.

* * * * *

(3) \$80,317 or more but less than \$100,000, then the Contractor shall utilize under this contract only domestic

photovoltaic devices, unless, in its offer, it specified utilization of Free Trade Agreement country photovoltaic devices (other than Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic devices), qualifying country photovoltaic devices, or other foreign photovoltaic devices in paragraph (d)(4) of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device, then the Contractor shall utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device; or, at the Contractor's option, a domestic photovoltaic device;

(4) \$100,000 or more but less than \$180,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices, unless, in its offer it specified utilization of Free Trade Agreement country photovoltaic devices (other than Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic devices), qualifying country photovoltaic devices, or other foreign photovoltaic devices in paragraph (d)(5) of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a Free Trade

Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device, then the Contractor shall utilize a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device; or, at the Contractor's option, a domestic photovoltaic device; or

(5) \$180,000 or more, then the Contractor shall utilize under this contract only U.S.-made, designated country, or qualifying country photovoltaic devices.

* * * * *

9. Amend section 252.225-7018 by—

a. In the introductory text, removing "225.7017-5(b)" and adding "225.7017-4(b)" in its place;

b. Removing clause date "(JAN 2018)" and adding "(DEC 2018)" in its place;

c. Revising paragraphs (b)(1) and (2); and

d. Revising paragraphs (d)(1), (d)(2) introductory text, and (d)(3) through (6).

The revisions read as follows:

252.225-7018 Photovoltaic Devices—Certificate.

* * * * *

(b) * * *

(1) If more than the micro-purchase threshold but less than \$180,000, then the Government will not accept an offer specifying the use of other foreign photovoltaic devices in paragraph (d) (2) (ii), (d) (3) (ii), (d) (4) (ii), or (d) (5) (ii) of this provision, unless the offeror documents to the satisfaction of the Contracting Officer that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.

(2) If \$180,000 or more, then the Government will consider only offers that utilize photovoltaic devices that are U.S.-made, qualifying country, or designated country photovoltaic devices.

* * * * *

(d) * * *

___ (1) No photovoltaic devices will be utilized in performance of the contract, or such photovoltaic devices have an estimated value that does not exceed the micro-purchase threshold.

(2) If more than the micro-purchase threshold but less than \$25,000—

* * * * *

(3) If \$25,000 or more but less than \$80,317—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

____(ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a Canadian photovoltaic device or a qualifying country photovoltaic device *[Offeror to specify country of origin_____]; or*

____(iii) The foreign (other than Canadian or qualifying country) photovoltaic devices to be utilized in performance of the contract are the product of _____. *[Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]*

(4) If \$80,317 or more but less than \$100,000—

____(i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device ;

____(ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device *[Offeror to specify country of origin_____]; or*

____(iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d) (4) (ii) of this provision) are the product of _____. *[Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]*

(5) If \$100,000 or more but less than \$180,000—

____(i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

____(ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) or a qualifying country photovoltaic device *[Offeror to specify country of origin_____]*; or

____(iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d) (5) (ii) of this provision) are the product of _____. *[Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in*

comparison to the cost of the proposed foreign photovoltaic device, i.e. that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(6) If \$180,000 or more, the Offeror certifies that each photovoltaic device to be used in performance of the contract is—

____(i) A U.S.-made photovoltaic device; or

____(ii) A designated country photovoltaic device or a qualifying country photovoltaic device. *[Offeror to specify country of origin_____.]*

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[FR Doc. 2018-26305 Filed: 12/3/2018 8:45 am; Publication Date: 12/4/2018]